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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA**

In re: ) Chapter 11  
)  
Benyam Mulugeta and ) Case No. 09-51900 ASW  
Paula R. Mulugeta, )  
) Date: February 14, 2013  
Debtors ) Time: 11:00 a.m.  
) Place: Courtroom 3020  
) Judge: Hon. Arthur S.  
) Weissbrodt  
)  
/

DEBTORS' SUPPLEMENTAL MEMORANDUM CLARIFYING APPLICATION OF 11  
U.S.C. SECTION 1123(b)(5)

INTRODUCTION

Sequoia Mortgage, whose three claims are identified in the  
Claims Docket as Claims Number 27,28, and 29 (collectively  
"Claims"), all of which are secured by deeds of trust  
encumbering debtors' real property located on 1025 Harker Avenue  
in Palo Alto, California ("Harker"), demanded that debtors  
clarify how Section 1123(b)(5) applies to treatment of its  
Claims in any plan that debtors might propose.

1 BACKGROUND

2 Debtors represent that when they purchased Harker, the  
3 developments on it consisted of a main house and a separate in-  
4 law unit. Both units were able to be lived in and rented out.  
5 At commencement of the case, in 2009, debtors lived in the main  
6 house. During the case they moved into the in-law unit and  
7 rented out the main house.

8 All of the Claims, as noted in the deeds of trust attached  
9 thereto, include as additional security the assignment of rents.  
10 Moreover, on page 12 of Claim 27 and page 13 of Claim 28, many  
11 different kinds of personal property, including televisions and  
12 radios, have been granted as additional security. All of the  
13 Claims matured by their terms pre-petition.

14 ISSUE

15 Section 1123(b)(5) provides in pertinent part that a plan  
16 "may modify the rights of holders of secured claims, other than  
17 a claim secured only by a security interest in real property  
18 that is the debtor's principal residence."

19 Sequoia Mortgage contends that, since Harker was debtors'  
20 principal residence on the Petition date, therefore its Claims  
21 may not be modified.  
22

23 ARGUMENT IN SUPPORT OF MORTGAGE MODIFICATION

24 Sequoia Mortgage cites to In re Abdelgadir, 455 B.R. 896  
25 (9<sup>th</sup> Cir. BAP 2011) for the proposition that the Petition date,

1 not a date close to plan confirmation, should be used to  
2 determine whether real property will be considered debtors'  
3 principal residence and subject to the anti-modification  
4 stricture of Section 1123(b)(5). Debtors do not argue this  
5 point.

6 Debtors contend that the Claims may be modified, because  
7 they were not secured only by an interest in debtors' residence.

8 Abdelgadir, supra at. p.903 cited favorably to In re  
9 Scarborough, 461 F.3d 406, 411 (3<sup>rd</sup> Cir. 2006), which held that a  
10 creditor who takes a security interest in property that is in  
11 part not debtors' residence or in any collateral that is not  
12 real property does not receive anti-modification protection.  
13 Scarborough dealt with a debtor's attempt to modify a deed of  
14 trust on a 4-plex in which debtor resided, the deed of trust for  
15 which contained an assignment of rents clause. See also, In re  
16 Arns, 372 B.R. 876, 803 (Bankr. N.D. Il. 2007) holding that

17  
18 "By including language which pledged as additional  
19 security any rents or profits derived from the property, the  
20 lender acknowledged that the property may be used for a  
21 commercial, income-producing purpose and sought to have its  
22 claim secured by such income, if any. This type of secured  
23 claim is outside the intended protection of Section 1123(b)(5)."

1 The legislative history to Section 1123(b)(5), reprinted in  
2 E1-9b Collier on Bankruptcy Section 206 (16<sup>th</sup> ed. Online 2012),  
3 reads as follows:

4 "This amendment conforms the treatment of residential  
5 mortgages in Chapter 11 to that in Chapter 13, preventing the  
6 modification of the rights of a holder of a claim secured only  
7 by a security interest in the debtor's principal residence.  
8 Since it is intended to apply only to home mortgages, it applies  
9 only when the debtor is an individual. It does not apply to a  
10 commercial property, or to any transaction in which the creditor  
11 acquired a lien on property other than real property used as the  
12 debtor's residence. See In re Hammond, 276 F.3d 52 (3<sup>rd</sup> Cir.  
13 1994); In re Ramirez, 62 B.R. 668 (Bankr. S.D. Cal. 1986)."

14 Ramirez, Id. permitted modification in a Chapter 13 plan of  
15 a mortgage secured by real property that covered not just the  
16 debtor's residence, but also two other units that were rented  
17 out.  
18

19 SECTION 1123(a)(5)(H) MAY BE USED WITHOUT VIOLATING SECTION  
20 1123(b)(5)

21 Even if, for the sake of argument, the court determines  
22 that the Claims may not be modified, still Section 1123(a)(5)(H)  
23 provides that a plan "shall provide adequate means for the  
24 plan's implementation, such as extension of a maturity date."  
25 Therefore, debtors contend that, at a minimum, they would be

1 permitted to extend the maturity of the Claims, just as can be  
2 done in Chapter 13 (see Section 1322(c)(2)) without running  
3 afoul of the anti-modification prohibition.

4 CONCLUSION

5 The anti-modification prohibition of Section 1122(b)(5)  
6 does not apply and debtors may modify the terms of the Claims.  
7 In any event, debtors may at the very least extend the maturity  
8 of the Claims.

9 Dated: 1/30/2013

/s/Stanley Zlotoff